BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

In the Matter of	)	
	)	
Review of the Policy Implications	)	MM Docket No. 91-221
of the Changing Video Marketplace	)	

COMMENTS OF
RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION

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Summary

The "wide-ranging" inquiry sought by the Commission in this proceeding should include a searching examination of the implications of the new video marketplace for FCC program content regulation. By reason of the Communications Act's public interest standard (which "necessarily invites reference to First Amendment principles"), minimization of program content regulation is one of the "core Commission goals" that should be the focus of this proceeding.

Using either the "spectrum scarcity" theory or the more traditional "print model" for application of the First Amendment to broadcasting, the implications of the growing diversity of programming and program sources, including expanding news and information choices, should lead the Commission to test its content regulation by a standard requiring a compelling need for any such regulation.

Numerical scarcity, not just allocational scarcity, is a necessary condition for forms of program content regulation that would not pass muster under traditional First Amendment theory. Numerical scarcity does not exist in the video marketplace today, and, indeed, the plethora of information sources will continue to greatly increase in the near future. Therefore, the Commission must recognize that there is no justification for any different regulation of broadcast content than of the print media, except that which is made necessary by the governmental interest in assuring that broadcast spectrum is used for the broad purpose of informational and entertainment programming for which those radio frequencies were allocated.

That allocational purpose can be accomplished without government regulation designed to fine-tune the composition of broadcast programming. The current FCC requirement that broadcasters submit lists of community issues and responsive programming, in order to demonstrate that each broadcaster is serving the public interest as intended by the frequency allocation and license assignment, is an acceptable form of limited program review. Regulation of fairness, political broadcasting and children's programming is not acceptable under a properly heightened sensitivity to the First Amendment. Other forms of program review and regulation need to be examined.

Four years after its landmark First Amendment decision in Syracuse Peace Council, the time is overdue for the Commission to come to grips with these issues. If necessary for a full discussion, a further notice of inquiry should be issued in this proceeding. Ultimately, the Commission should interpret statutory provisions to give broadcasters the greatest content discretion possible, and should recommend to the Congress that changes be made in statutory law mandating FCC regulation which infringes upon the First Amendment rights of broadcasters.

The fact of FCC licensing, which is necessary to assign radio frequencies allocated to broadcasting, is not a reason for FCC control of programming. Rather, judging from the history of government abuse of press licensing through the centuries, the licensing power is a strong reason for the government of a liberty-loving people to do all that it can to avoid any involvement in determining the journalistic content of radio and television, the most important free-press media today.

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The Radio-Television News Directors Association ("RTNDA")[1] submits these comments in response to the Notice of Inquiry ("Notice"), FCC 91-215, released on August 7, 1991, in the above-captioned proceeding.

I. The Importance of Reconsidering Program Content Regulation

The Commission has initiated this proceeding "in order to seek wide-ranging comments on changes in the state of the video marketplace and the public policy implications that flow from these changes" (Notice, ¶ 1). Referring to a recent FCC staff working paper on this marketplace,[2] the Commission has focused on competitive and technological changes in the industry and their implications with respect to "core Commission goals" -- including diversity and the public interest standard -- and the "steps"

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1 RTNDA is the principal professional organization of journalists who gather and disseminate news and other information on radio and television in the United States.

2 Seltzer & Levy, Broadcast Television in a Multichannel Marketplace (FCC Office of Plans and Policy, Working Paper No. 26, June 1991)("OPP Report").

which should be taken by the agency to promote those goals (Notice, ¶ 2).

RTNDA's interest in this proceeding concerns the implications of this changing marketplace for program content regulation by the Commission. RTNDA has long advocated stronger First Amendment protection of radio and television program content. The rapid increases in diversity factors, such as numbers of broadcast stations and program sources, give greater force to an evolving understanding of the First Amendment's application to broadcasting. Yet, in the Notice, the Commission has made no specific mention of possible program deregulation under a First Amendment analysis, even though the minimization of content regulation should be -- indeed, must be under the First Amendment -- at the highest level of "core Commission goals."[3] The Commission recognized this in its landmark Syracuse Peace Council opinion: "[I]n an analysis of any Commission regulation, it is well-established that First Amendment considerations are an integral component of the public interest standard."[4]

The "wide-ranging" nature of this proceeding and its premise in the far-reaching changes in the video marketplace are ideal for a basic review of FCC policy and law on program content.

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3 Since the Notice specifies the public interest standard as a "goal", it should be noted that the Supreme Court has stated that "the 'public interest' standard necessarily invites reference to First Amendment principles." Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 122 (1973).

4 In re Complaint of Syracuse Peace Council against Television Station WTVH, 2 F.C.C.Rcd 5043, 5046 (1987), aff'd, 867 F.2d 654 (1989), cert. denied, 110 S. Ct. 717 (1990).

The escalating importance of electronic media in communicating information and entertainment to the public makes it mandatory that all branches of the government give further thought to what freedom of press and speech means in terms of contemporary media. The future of the First Amendment in the 21st Century is at stake in these reviews because television has eclipsed newspapers and will increasingly be the most important news medium for the public.[5] If the Commission does not continue the basic regulatory reform begun in Syracuse Peace Council, it will put at great risk important liberties hard won for the press and the people.

II. First Amendment Theories for Broadcasting

In reconsidering program content regulation of television broadcasting, the Commission should start with its own

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[5] According to the Roper Organization,

> "[i]n December 1990 - even before the outbreak of war in the Persian Gulf drew record-breaking numbers of viewers to their television sets - nearly 7 in 10 Americans (69%) reported getting most of their news about what's going on in the world from television, an all-time record in the 32-year history of Roper's television surveys. * * * Reliance on television news was extremely high in both cable and non-cable households.
>
> "Moreover, television's lead over newspapers also reached a record - a 26 percentage point gap."

America's Watching: Public Attitudes Toward Television, p. 10 (1991).

In mid-February 1991, the proportion of Americans saying they received most of their news from television rose from 69 to 81 percent. "And while the number counting on television surged by 12 percentage points, a much lower proportion (35%) than two months earlier (43%) cited newspapers as a major source of news." Id. at 12.

First Amendment analysis in Syracuse Peace Council.[6] There, the fairness doctrine was found to violate the First Amendment under either of two theories. One followed the "spectrum scarcity" rationale of Red Lion Broadcasting Co. v. FCC,[7] and the other followed a "print model" or "traditional" approach to the First Amendment. RTNDA believes that under either analysis most of the existing statutory and FCC-made regulation of program content is unconstitutional.

In the appeal of Syracuse Peace Council, Judge Starr, who was the only member of the court to reach the First Amendment issue, explained that the allocational scarcity so often used as the justification for FCC broadcast regulation is not enough to justify program regulation under Red Lion.[8] He called allocational scarcity a "necessary" but not a "sufficient" condition for special regulation of broadcasting. Referring to the Commission's argument in Syracuse Peace Council, Judge Starr agreed that, in the sensitive area of programming protected by the First Amendment, numerical scarcity has been the controlling factor, with the rationale that without government intervention the public would not be provided access to diverse viewpoints.

The foregoing analysis led to Judge Starr's agreement with the Commission in that case that large increases in the

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6 Supra note 4, 2 F.C.C.Rcd at 5045-57.

7 395 U.S. 367 (1969).

8 Syracuse Peace Council v. FCC, 867 F.2d 654, 682-83 (1989) (Starr, J., concurring), cert. denied, 110 S. Ct. 717 (1990). Judge Starr has more recently become Solicitor General of the United States.

numerical diversity of broadcast stations are highly relevant to determining whether program regulation is necessary and therefore constitutional under Red Lion. "The governing constitutional doctrine therefore recognizes that the communications marketplace may be sufficiently responsive to the public's need for controversial issue programming so that government regulation is unnecessary. * * * As the Court has stated time and again, regulatory schemes that tread unnecessarily on the editorial discretion of broadcasters contravene the First Amendment."[9]

The print-model or traditional approach to the First Amendment, which was the Commission's "preferred constitutional approach" in Syracuse Peace Council,[10] asks whether a particular form of content regulation could be applied constitutionally to print media. If not, then it should not be considered constitutional for broadcasting. Obviously, this approach has not always been followed by the Supreme Court, as a comparison of Red Lion and the Tornillo[11] opinions dramatically demonstrates. In almost all areas of non-FCC law particularly affecting the press, such as libel, reporter's privilege, prior restraint and the like, print and electronic media are protected to the same degree by the First Amendment. FCC regulation of broadcast program content,

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9 Id. at 684 (citations omitted).

10 Supra note 4, 2 F.C.C.Rcd at 5052-57.

11 Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (right of reply obligation unconstitutional on its face when applied to newspapers).

however, has generally been tested under looser standards emanating from Red Lion.

A workable print-model or traditional approach to the First Amendment should be developed for FCC broadcast regulation. It would command the Congress' and the FCC's adherence to the entire body of First Amendment press law, with the exception of content regulation that is compellingly necessary. Roughly the same result should be reached, however, under a properly applied spectrum scarcity rationale.[12]

Thus, regulations closely connected with the Commission's necessary functions of allocating and assigning frequencies are constitutional even though they result in denying the ability to broadcast to those who do not receive licenses.

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12 The importance of numerical scarcity under this rationale, as explained by Judge Starr, makes relevant the greater diversity of radio and television when compared to daily newspapers, which prior to the radio age had been the principal daily medium of local, national and international news. While broadcasting and other video information channels have become less "scarce", daily newspapers of general circulation have become more "scarce", falling in number from 1745 in 1980 to 1611 in 1990. Editor and Publisher Co., New York, NY, "Editor & Publisher International Year Book" (1991); U.S. Bureau of the Census, "Statistical Abstract of the United States: 1990", 110th ed. (1990). Even more to the point, competing newspapers in the same community are "passing from the contemporary scene." There are only 63 communities in the United States with two or more daily newspapers today, compared with 172 in 1980; only 12 of those communities have separately owned rival newspapers, compared with 35 in 1980. Jones, "At Many Papers, Competition Is At Best an Illusion," N.Y. Times, Sept. 22, 1991, Sec. 4, at 18, col. 1. Under all of these circumstances and even applying a spectrum scarcity analysis, it is illogical for broadcasters to receive less First Amendment protection than newspapers, except when regulation is made absolutely necessary by the Commission's licensing function.

Similarly, those who do receive licenses allocated for that purpose may be required to provide a program service of news and entertainment for the general public.

There is a significant philosophical difference between both of the above-described First Amendment theories -- spectrum scarcity and print model, on the one hand, and, on the other, the aggressively regulatory "public trustee" concept of broadcasting, which seeks to justify a broad range of program regulation under Red Lion. The "public trustee" concept (the very name of which indicates its conflict with the broadcaster's journalistic independence[13]) rests on the premise that the government's licensing function gives it the power and duty to condition those licenses on agreements by licensees to accept programming requirements that would otherwise violate their First Amendment rights. The "public trustee" approach is directly contrary to the well-established doctrine that the government may not condition its bestowal of benefits on the relinquishment of constitutional rights.[14]

The traditional theory of the First Amendment's restraining purpose is predicated on an understanding of history that teaches of the potential excesses of the government's

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13 It is often said that "a newspaper is a public trust", but that hortatory statement, which carries journalism's sense of moral responsibility, carries no legal obligation, as indeed it could not without infringing upon the journalistic independence protected by the First Amendment.

14 Rutan v. Republican Party of Illinois, 110 S. Ct. 2729, 2736 (1990); Elrod v. Burns, 427 U.S. 347, 358-60 (plurality opinion) and 375 (Stewart, J., concurring) (1976); Perry v. Sinderman, 408 U.S. 593, 597 (1972).

licensing power.[15] The danger inherent in a press licensing power (which is technologically necessary for practical broadcasting and thus permitted, while technologically unnecessary for practical print publishing and thus forbidden) is all the more reason that government should be restrained by the First Amendment from influencing the broadcast licensee's selection of program content to any degree not truly necessary.[16]

III. The OPP Findings Demonstrate A High Degree of Diversity

The numerical scarcity that, under Red Lion, arguably justified the fairness doctrine and other forms of program content regulation no longer exists. The Commission has repealed the fairness doctrine, but it has not yet repealed other program regulation, including rules grounded upon fairness doctrine principles.[17] The Office of Plans and Policy has now made

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15 For a brief overview of press licensing abuses in 16th and 17th century England, see Emord, Freedom, Technology, and the First Amendment, pp. 25-29 (1991). A leading work on the subject is Siebert, Freedom of the Press in England 1476-1776 (1988).

16 Broadcasters are not the only journalistic entities whose First Amendment rights are endangered by theories of government power to regulate program content based on the FCC's licensing function. Other entities, including cable television systems, newspaper companies, and program networks and syndicators, use licensed radio spectrum as part of the chain of distribution of informational material to the public.

17 RTNDA and other parties have twice petitioned for repeal of the personal attack and political editorial rules (47 C.F.R. §§ 73.1920 and 73.1930). See Joint Petition for Expedited Rulemaking Action and for Clarification of Memorandum Opinion and Order Ending Enforcement of the Fairness Doctrine, filed in MM Docket No. 91-168, August 25, 1987; Second Petition for Expedited Rulemaking Action and for

Continued on following page

findings on the diversity of broadcast television and other video program sources that undermine the constitutional validity of practically all of the FCC's remaining forms of program content regulation.[18]

OPP's impressive statistics on the number and variety of video outlets and their programming -- broadcast, cable (wired and wireless), satellite-to-home, and videocassette-recorder -- need no re-telling here.[19] Aside from sheer numbers, which contradict any notion of numerical scarcity in video and audio mass communications, there are several developments that bear emphasizing.

Continued from previous page
Further Ruling on Ending Enforcement of Fairness Doctrine, filed in MM Docket No. 91-168, January 22, 1990. The second petition included a request for a declaratory ruling that ballot-issues fairness regulation also is invalid under the holding or reasoning of the Commission's Syracuse Peace Council decision.

18 In 1985 and 1987, the Commission concluded, from findings that showed less diversity then than now, that there was ample diversity to justify repeal of the fairness doctrine. See In the Matter of Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 196-221 (1985) ("1985 Fairness Report"); Syracuse Peace Council, supra note 4, 2 F.C.C.Rcd at 5053-55.

19 Radio broadcasting outlets are, of course, even more numerous than television, as frequent reports from the Commission show. The FCC News release, Broadcast Station Totals As Of October 31, 1991, Mimeo No. 20526, November 7, 1991, provided the following station figures:

AM Radio	4,988
FM Radio	4,539
FM Educational	1,497
Total =	11,024

-- Viewing of the major networks is severely diminished and still weakening.[20] There is no threat of a dominant source of news and information in this country.

-- Cable television passes more than 91 percent of U.S. television households[21] and includes "some retransmitted broadcast signals (local and distant), some satellite-delivered cable networks, and some locally-originated cable channels (e.g., public access, educational, and government)."[22] This has eliminated any possible numerical scarcity of information sources.

-- Video compression and new program delivery systems promise to lower the barriers to entry and open system capacity,[23] thus, permitting even greater numerical diversity in the near future. There is certainly no danger that numerical diversity will decline.

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20 OPP Report, pp. 25-29.

21 OPP Report, pp. 68 (Table 15), 70. While the number of cable subscribers has been growing rapidly, the constitutionally significant statistics pertain to diverse program viewing opportunities rather than actual viewing.

22 OPP Report, p. 69.

23 OPP Report, pp. 49-50. Beyond the traditional print and electronic mass media of the present and future, interactive communications between non-media entities, including average citizens, will be enlarged for significant exchanges of information and opinion through computers and modems. See "The First on a new frontier," and "Extending press freedom," The Quill, September 1991, pp. 18-21. Both professional journalism and citizen participation channels could be expected to multiply if there were universal availability of a "video dial tone" on fiber-optic telephone lines, as proposed by Chairman Sikes, who believes it "would be a far more significant development than going from radio to TV" because "we could all become programmers." Remarks of Chairman Sikes before the Annual Business Week Symposium on Information Highways, Sept. 11, 1991, pp. 3-7.

-- Unnecessary program regulation of broadcasters handicaps them in their competition with other program delivery systems not subject to that regulation, and may ultimately result in less public service programming by broadcasters.[24]

Chairman Sikes recently spoke of the contrasting situations of scarcity in the formative years of broadcast regulation and the high degree of diversity today. He pointed not only to numerical growth through additional broadcast stations and cable program channels but also to the program contributions of public broadcasting stations nationwide.[25]

IV. Expanding News and Information Choices

Chairman Sikes used the above heading in his written testimony before the Senate Subcommittee on Communications this past June. He said that "perhaps the best measure of how well broadcasting is now serving the public's interest is the number and diversity of news, information, and public service choices." The Chairman's testimony on this point, reproduced below, is highly persuasive:

> "According to the Woodrow Wilson Center for Media Research, which is part of the Smithsonian Institution, there has been approximately a three-fold increase in local television news programming in major markets since 1980. During the 1980s, the Television Information Office published several studies marking this phenomenon, showing that network affiliates increased local news coverage by 10

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24 OPP Report, p. 2.

25 Statement of Alfred C. Sikes, FCC Chairman, Before the Senate Subcommittee on Communications, on the Public Interest Standard Under the 1934 Communications Act, June 20, 1991, pp. 3-4.

percent each year in both the morning and prime-time access dayparts from 1986-1988.

"The addition of noon-time, afternoon, and weekend news telecasts has contributed to the overall increase. During the late 1980s, the number of independent television stations with local news programs also increased by about 25 percent. Since 1970, the amount of national network news and public affairs programming has risen by about 30 percent. This does not take into account the fact that the Fox Television recently has added a two-hour morning news program.

"We examined the actual number of hours of news and public affairs programming broadcast by commercial television stations in St. Louis and Washington, relying on program schedules published in daily and Sunday newspapers. We chose the third Thursday of June in each of 1961, 1971, 1981, and 1991. We found in St. Louis, for example, that the total number of such hours rose by 33 percent, between 1961 and 1971, and 81 percent between 1971 and 1981. In Washington, D.C., the number of such hours rose by 19 percent between 1981 and 1991. * * *

"Additional News and Information Sources

"Perhaps most striking has been the growth of cable television and associated cable news, information, and public affairs programs. In 1980, there were two cable networks dedicated to news and public affairs programming. Since that time, the National Cable Television Association reports that the major markets have experienced an estimated 370 percent increase in news and public affairs programs, providing viewers with over 1,000 hours of weekly news and public affairs coverage. At the same time, news and public affairs programming has increased from 14 percent to 24 percent of total cable programming available. In the New York area, which has been meticulously studied, this results in some 1339 hours per week of news and public affairs programs.

"News format radio has also greatly expanded. Between 1974 and 1990, the number of

such radio stations grew nearly five-fold.
* * * "[26]

This expansion of news programs and the sources of news programs is strong evidence that the public interest standard of the Communications Act is being met by broadcasters. It also bears on the question of the validity of continuing government regulation that is not necessary to cause broadcasters to serve community needs. In his Senate testimony, Chairman Sikes stated that "competitive marketplace forces will cause broadcasters to satisfy those needs much more effectively than can be achieved by relying on a small number of Government officials in Washington." He also recognized that this approach "is most consistent with fundamental First Amendment values as well."[27]

V. Most Existing Program Regulation Violates the First Amendment

In view of what is said above about the competitive video marketplace, most of the Commission's remaining regulation of programming can only be for the purpose of dictating a programming philosophy for private broadcasters and cablecasters and for controlling the terms of political debate on television. The First Amendment is in conflict with these governmental purposes.

There is more than enough competition in the markets for programs and their distribution outlets to assure that all substantial parts of the public will obtain the programming they

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26 Id. at 7-8 (attachment omitted).

27 Id. at 10.

want, which is not always what persons controlling the governmental regulatory bodies want. The fact is that most of the controversy over program regulation involves not what kinds of programs are presented but rather how much of those kinds of programs are presented.

News, children's and "cultural" programs are examples. Yet, in each case, the market will determine an appropriate amount on the basis of supply and demand, which excludes control by either private or governmental individuals. Public broadcasters and their program producers, which are funded by government grants and by contributions from private persons desiring more of certain types of programs, provide more of those types of programs than a market system will do in responding to the entire viewing population. Government subsidies of this kind are far less intrusive and more narrowly tailored[28] to deal with the perceived problem than is direct dictation of programming and advertising standards, such as that which exists in the political broadcasting and children's television areas.

Therefore, the government is not needed -- and perforce is not permitted under First Amendment law -- to fine tune by fiat the selection of programs for the public. Under a properly applied "scarcity rationale" or "print model" rationale for broadcast regulation, the Commission's licensing function should

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28 "Government restrictions on broadcasters' speech are only valid if 'narrowly tailored to further a substantial government interest.'" Syracuse Peace Council, supra note 8, 867 F.2d at 681-82 (Starr, J., concurring); FCC v. League of Women Voters of California, 468 U.S. 364, 380 (1984).

call forth only the general commitment of broadcast station applicants to provide programs from among the kinds of informational and entertainment programming for which those radio frequencies were allocated.

Hence, under the public interest standard of the Communications Act, the Commission may test that commitment in a general manner, such as through the quarterly showings of community issues/programming responsiveness now required. The Commission has pending a renewal policy proceeding in which it has recognized the value of this limited form of regulation in reconciling its licensing duties with the First Amendment.[29]

VI. The Commission Should Issue a Further Notice If Necessary

The Notice in this proceeding, while encouraging wide-ranging comments on the implications of the new diversity, discussed the possibility of changes in structural regulation only. If the responsive comments do not sufficiently address the issue of the need for and legality of the various forms of program-content regulation, the Commission should issue a Further Notice of Inquiry to solicit such comments. The Further Notice should include a request for legal advice on the extent to which

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[29] In the Matter of Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process, BC Docket No. 81-742. RTNDA stated in that proceeding its view that this limited form of program regulation is constitutional. Letter comments of David Bartlett, RTNDA President, October 3, 1989.

certain statutorily mandated regulation may be curtailed by the Commission without action by the Congress.

While RTNDA expects to comment in more detail if the Commission proceeds to further inquiry or rulemaking on the subject of program regulation, we shall here briefly identify some of that regulation which RTNDA believes should be repealed or loosened.

The personal attack and political editorial rules, together with the remaining "ballot-issues" fairness regulation, should be rescinded as remnants of the discredited and unconstitutional fairness doctrine.[30] The absence of any showing of significant unfairness by broadcasters during the past four years that the general fairness doctrine has not been enforced is compelling evidence of the lack of any threat from fairness deregulation.

So long as Section 315(a) of the Communications Act remains statutory law, the Commission should continue to reinterpret the news programming exemptions to give as much journalistic freedom to broadcasters as is consistent with the language of the provision, its legislative history and case law. Fortunately, the text and history of that equal-opportunities law fully support recognition of a broad discretion in broadcasters to determine many of the particulars that will fit within the specified exemptions.

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30 See Op. cit. supra note 17.

The bona fide newscast and other news exemptions should be interpreted so as not to require direct editorial control of the program in question by a station or network licensee (thereby excluding the programs of non-licensee networks and syndicators from eligibility from the exemptions).[31] Further, the exemption of Section 315(a)(3) for "bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary)" is in need of fresh interpretation. In the past, the Commission has declined to resolve the uncertainty in the wording of this exemption.[32] The Commission should make clear that the subjects of documentaries about political campaigns can be the various themes of political campaigns and that candidates' appearances in these programs are incidental thereto.

Some other statutory provisions which should be reinterpreted to give more leeway to broadcasters' discretion in programming are the "reasonable access" provision of Section 312(a)(7); the "lowest unit charge" provision of Section 315(b); the "indecency" prohibition of 18 U.S.C. § 1464; and the Children's Television Act of 1990, 47 U.S.C. 303a & 303b.

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31 See Joint Comments and Reply Comments of RTNDA et al., filed in MM Docket No. 91-168, August 7, and 23, 1991, respectively.

32 In Re Petitions of Henry Geller and National Association of Broadcasters and the Radio-Television News Directors Association to Change Commission Interpretation of Subsections 315(a)(3) and (4) of the Communications Act, 95 F.C.C.2d 1236, 1247 (1983).

Reinterpretation of statutory regulation of program content would be unnecessary if the Congress repealed the applicable provisions, including Sections 303a, 303b, 312(a)(7), and 315 of the Communications Act. Upon completion of the First Amendment analysis and review of other comments called for here, the Commission should take steps to eliminate or minimize the intrusiveness of its own program content regulation and, further, should make recommendations to the Congress concerning repeal of controlling statutory provisions believed by the Commission to be unconstitutional.

The "public interest standard" of the Act would not be rescinded thereby. As stated above, the issue-responsive programming lists now required quarterly from broadcasters appear to fit a public interest standard consistent with both the print model for a licensed medium and the spectrum-scarcity approach. There may be other program-conscious forms of FCC regulation that could pass the First Amendment's strict test of necessity. The public interest standard, of course, has many more applications in non-programming areas.

Conclusion

The First Amendment implications of the new television diversity are too vital to be ignored in this proceeding. If necessary for a full consideration of the First Amendment issues by all interested parties, a further notice of inquiry should be issued in this proceeding. The Commission must come to grips with the unconstitutional premises of its remaining program-content

regulation of radio and television, the nation's most important "press" media.

Respectfully submitted,

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